LEE WAI KAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdoolcader J.) December 12, 1974]
[Ipoh — Criminal Appeal No. 85 of 1974]

Criminal Law and Procedure — Robbery with deadly weapon — No evidence to show which of two persons involved in robbery was armed with knife — Whether section 34 of Penal Code can be invoked to support charge against accused under s. 397 of Penal Code — Sentence — Special circumstances — Penal Code, ss. 34, 392 and 397.

Penal Code, ss. 34, 392 and 397 — Robbery with deadly weapon.

The appellant and another accused were charged with armed robbery under sections 392 and 397 of the Penal Code. The appellant and the other accused pleaded guilty and were convicted. There was no evidence to show which of the two persons involved in the robbery was armed with a knife. The other accused who was 17 years and 6 months was ordered by the Sessions Court to be sent to the Henry Gurney Boys School for 3 years. The appellant who was some 6 to 8 months older than the other accused was sentenced to 4 years imprisonment. On appeal it was argued (a) that the proceedings were a nullity in view of the fact that the charge against the appellant for robbery was under sections 392 and 397 of the Penal Code read together with section 34 of the Penal Code and that section 34 of the Penal Code has no application to section 397 of the Penal Code; (b) there was a serious disparity in the sentence imposed on the other accused and the appellant.

Held: (1) there was no reason why section 34 of the Penal Code should not apply to section 392 read together with section 397 of the Penal Code to the same extent as it applies to other offences and therefore the appellant was rightly convicted;

(2) in the special circumstances of this case and particularly in view of the disparity in relation to the punishment imposed on the appellant and on the other accused, the sentence would be reduced to 2 years imprisonment.

[Editorial Note: See the case of *Subramaniam and Anor.* v. *Public Prosecutor* [1976] 1 M.L.J. 76 where Ajaib Singh J. at p. 77 said: "The joint liability of two or more persons in the doing of a criminal act under section 34 of the Penal Code does not extend to section 397 of the Penal Code". The case of *Rex* v. *Yeo Kim Watt*(2) was not referred to in that case].

Cases referred to:-

(1) *Labedan Sain* v. *Emperor* A.I.R. 1931 Pat. 49.

(2) *Rex* v. *Yeo Kim Watt* [1946] M.L.J. 155.

CRIMINAL APPEAL

J. R. Devadas for the appellant.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the respondent.

Abdoolcader J. (delivering oral judgment): This is an appeal against conviction and sentence. Normally by virtue of the provisions of section 305 of the Criminal Procedure Code (F.M.S. Cap. 6) no appeal will lie when an accused person has pleaded guilty as the appellant did in this case in the lower court. Mr. Devadas, counsel for the appellant, however raises the issue that the charge and the proceedings were a nullity in view of the fact that the charge against the appellant for robbery was under sections 392 and 397 of the Penal Code read together with section 34 of the Penal Code. He submits that there was no evidence adduced as to which of the two persons involved in the robbery in question was armed with a knife. Mr. Devadas relies on the Indian case of *Labedan Sain* v. *Emperor*(1) for the proposition that where two or more persons are involved in a robbery, section 34 of the Penal Code has no application to section 397 of the Code, that it must therefore be affirmatively shown that it was the appellant who was armed with a knife, and that accordingly the charge was bad and the proceedings a nullity.

I pointed out the conflicting decisions on this point in the Indian courts but it is not necessary to go further into this issue as fortunately, or perhaps unfortunately for the appellant, the matter has in fact been conclusively determined by the Court of Criminal Appeal of Singapore in *Rex* v. *Yeo Kim Watt*(2) to the effect that there is no reason why section 34 of the Code should not apply to section 392 or section 393 read together with section 397 of the Code to the same extent as it applies to other offences. Mr. Devadas had of course to concede that this case covers the point in question, and I find that *Yeo Kim Watt, supra* disposes of the issue raised. In the circumstances, there is no merit whatsoever in the appeal against conviction and I accordingly dismiss it.

I now come to the appeal against sentence. The appellant who had pleaded guilty was convicted and sentenced by the learned Special President to 4 years imprisonment. It has been pointed out to me that the other person who was involved in the same robbery together with the appellant was 17 years old 6 months of age and was ordered by the Special Sessions Court to be sent to the Henry Gurney Boys School in Malacca for 3 years. The appellant now complains of the serious disparity in the sentence. He would appear to be some 6 to 8 months older than the other person who was involved in the other case according to his date of birth which appears in the probation report.

I have carefully considered the submissions on fact and law made by counsel for the appellant and the learned Deputy Public Prosecutor in the matter of sentence. The learned deputy concedes that there is in fact some disparity but he goes on to justify the disparity on various grounds and submits that the learned Special President had in fact taken into consideration the disparity in the sentence when imposing a term of 4 years imprisonment on the appellant. On a serious consideration of the matter and the probation report and in view of the age of the appellant, and considering the fact that the other person involved together with him was sent to the Henry Gurney Boys School, I am inclined to the view that the punishment imposed was a little severe in the special circumstances of this case.

Robbery is an abhorrent and violent crime particularly when weapons are used in its commission although not used physically in the sense of inflicting actual bodily harm; but the terror is still there and a stop must be put to this through deterrence. The question of public interest is as important and vital as other considerations including antecedents, age and background of an accused person. The appellant as I have pointed out is some 6 to 8 months older than the other person. It may well be in the circumstances that he deserves a somewhat higher form of punishment than the other person. The argument that just because there is that amount of a few months' difference between their ages would necessarily entitle him to the same form of punishment is not in my view

valid as otherwise any extension of the already thin dividing line in the spectrum of the ages of youthful offenders would result in ignoring other material considerations and result in a *reductio ad absurdum.*

In all the circumstances of this case and particularly in view of the disparity in relation to the punishment imposed on the other person involved as I have stated earlier I reduce the sentence of 4 years to 2 years imprisonment.

I would add immediately that I have done so in the special circumstances of this case which I have adumbrated and that the mere age of an offender is only one of the considerations to be taken into account and will not necessarily result in any alteration in sentence per se.

Order accordingly.

Solicitor: *J.R. Devadas.*

HAN PIT LOH SDN. BHD. v. CHUN HENG TIN MINE

[O.C.J. (Arulanandom J.) January 22, 1975]
[Ipoh — Civil Suit No. 380 of 1973]

Practice and Procedure — Conditional leave to defend — Amended statement of claim — No merits in defence — R.S.C., 1957, O.14.

In this case the plaintiffs sued the defendants for goods sold and delivered. The goods were sold by the Hup Fatt Tin Mining Kongsi, which was later purchased by the plaintiffs, Han Pit Loh Sendirian Berhad who became the successors to Hup Fatt Tin Mining Kongsi. The defence was a bare denial and denied any knowledge of the plaintiffs presumably on the ground that they had not purchased the goods from the plaintiffs but their predecessors in title. On an application for summary judgment, the Assistant Registrar granted conditional leave to defend to the defendants upon the defendants depositing the amount claimed within three weeks from the date of the order. The defendants appealed against the order of the Assistant Registrar.

Held: a study of the numerous defendants' affidavits in reply cannot but lead to the conclusion that the defence was not *bona fide* but merely an attempt to delay the process of the court and delay the delivery of judgment. Under the circumstance even final leave to enter judgment may have been the proper order to be given and the appeal must therefore be dismissed.

Case referred to:-

(1) *Foong Weng Tat* v. *Vu Siew Chin* [1974] 2 M.L.J. 20.

CIVIL SUIT.

J.R. Devadas for the appellants/defendants.

Ong Tin Kim for the respondents/plaintiffs.

Arulanandom J.: This is an appeal from the decision of the Senior Assistant Registrar whereby he granted conditional leave to the defendants to defend the suit when the plaintiffs sought an order under Order 14 for final judgment.

The claim was for goods sold and delivered to the defendants by one Hup Fatt Mining Kongsi, later amended to Hup Fatt Tin Mining Kongsi which was later purchased by Han Pit Loh Sendirian Berhad who became the successors to Hup Fatt Tin Mining Kongsi. According to the Statement of Claim and amended Statement of Claim at the time of the agreement of sale the defendants owed the said Hup Fatt Tin Mining Kongsi the sum of $11,345. The plaintiffs as successors to Hup Fatt Tin Mining Kongsi claimed this sum with other attendant reliefs from the defendants after having given due notice to the defendants.

The Specially Indorsed Writ was filed on December 20, 1973 and Defence filed on April 16, 1974. The defence was a bare denial and denied any knowledge of plaintiffs presumably on the ground that they had not purchased goods from the plaintiffs but their predecessors in title.

On May 13, 1974, a Summons in Chambers was filed for final judgment with an affidavit of merit.

The sole proprietor of the defendant firm through his present solicitors filed an affidavit in reply stating his dealings were with a third party and not with Hup Fatt Tin Mining Kongsi and also pleading limitation and stating he had good defence. He also stated the agreement did not constitute an assignment under section 4(3) of the Civil Law Ordinance, 1956.

On May 25, 1974, an application was made by defendants to amend the Defence whereby they stated they had no dealings with Hup Fatt Mining Kongsi (the name originally used by the plaintiffs as that of their predecessors in title). This application was allowed.

On July 10, 1974, the plaintiffs filed a Summons in Chambers to change the name Hup Fatt Mining Kongsi to Hup Fatt Tin Mining Kongsi and claiming that Notice of Assignment to the plaintiffs had been given to the defendants. This was opposed by the defendants but the application was allowed.

On September 18, 1974, an amended Statement of Defence was filed in terms of enclosure 19.

Further affidavits were filed and finally the application for final judgment was heard by the Senior Assistant Registrar on October 23, 1974 where he gave conditional leave to defend upon the defendants depositing the amount claimed within three weeks from date thereof.

The registrar dealt with the objections of the defendants and made his order for the following reasons. He did not see any merit in the objection that the affidavit and summons for judgment referred to the first Statement of Claim and not the amended one. The registrar held that in view of the affidavit in reply, the defect, if any, had been cured. He also held that the claim being one for a liquidated sum for goods sold and delivered, a mere denial was not sufficient. On the defence of limitation, he held that on the facts disclosed in the affidavit as the last payment by the defendants was on May 15, 1968, the claim was not statute-barred. He further went on to say that the Defence raised was a sham but in spite of that he gave the defendants conditional leave to defend.

As far as the registrar's grounds are concerned, it is settled law that amended statements of claim revert to the date of the original. Hence no new summons for judgment was needed. *Re* the other grounds, this court is fully in agreement with the principles relied on by the Senior Assistant Registrar.